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No. 272

# In the Supreme Court of the United States

OCTOBER TERM 1925

ANDREW W. MELLON, DIRECTOR GENERAL AND AGENT (SUBSTITUTED IN PLACE OF JAMES C. DAVIS), APPELLANT PETITIONER

*v.*

MICHIGAN TRUST COMPANY, RECEIVER OF RATHBONE MANUFACTURING COMPANY, RESPONDENT

*ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR APPELLANT-PETITIONER

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# In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 272

ANDREW W. MELLON, DIRECTOR GENERAL AND AGENT (substituted in place of James C. Davis), appellant-petitioner

*v.*

MICHIGAN TRUST COMPANY, RECEIVER OF RATHBONE Manufacturing Company, respondent

*ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF IN BEHALF OF APPELLANT-PETITIONER

### OPINION BELOW

The opinion of the United States Circuit Court of Appeals is reported in 2 Fed. Rep. (2 Ed.) 194. (R. 23–28.)

### JURISDICTION

The judgment to be reviewed is dated November 10, 1924. (R. 22–23.) Said judgment affirmed the order or decree of the United States District Court for the Western District of Michigan, Southern Division, disallowing priority to a claim filed with the Master in the above entitled receivership pro-

ceedings, by the Director General of Railroads, for transportation charges and for the conversion of a certain shipment by the debtor, all accruing to the said Director General out of the federal operation of railroads. (Decree District Court R. 18.)

On March 2, 1925, appellant-petitioner presented to this Honorable Court (Judicial Code Sec. 240), a petition for certiorari to said Circuit Court of Appeals, which petition was granted on April 13, 1925. (Memo. Opinion 45 Sup. Ct. Rep. 507.)

## STATEMENT OF THE CASE

On the 6th day of December, 1919, the respondent, the Michigan Trust Company, was appointed receiver of the Rathbone Manufacturing Company, a corporation under the laws of Michigan, by the United States District Court for the Western District of Michigan, under a bill filed by the White Sewing Machine Company, a corporation under the laws of Ohio, and William G. Renwick of Chicago, Illinois.

Said bill, among other things, alleged that said Sewing Machine Company was a creditor of defendant in the amount of Three Thousand Dollars ($3,000) and that the said Renwick was a creditor for One Thousand Dollars ($1,000); that during a considerable portion of the time during the last several years defendant had been conducting business at a substantial loss; that it had borrowed from the banks in Grand Rapids and from its stockholders large sums of money, to wit, over One

Hundred Thousand Dollars ($100,000) in order to pay its merchandise accounts and other indebtedness and its losses in operation; that it was impossible for defendant to borrow further sums with which to meet its indebtedness; that it was unable to pay its debts in the ordinary course of its business as persons in trade usually do and are required to do; that its cash on hand was only One Hundred Dollars ($100) or thereabouts, and that it had practically no quick assets whatever; that it had accounts receivable of Eight Thousand Five Hundred and Forty Dollars ($8,540) or thereabouts but was unable to collect the same or any considerable portion thereof immediately; that the indebtedness of defendant, exclusive of its indebtedness on account of capital stock, amounts to One Hundred and Forty Thousand Dollars ($140,000) or thereabouts, of which a large portion was then due and payable, the balance being represented by notes of the defendant which would fall due at various times within the near future. On information and belief it was alleged that as a going concern the value of defendants assets exceeded the amount of its liabilities but that a stoppage or interference of its business would result in a great depreciation of the value of its plant and assets making it impossible that defendant could pay its debts; that judgments had been recently taken against defendant amounting in the aggregate to Five Thousand Dollars ($5,000) and various other suits com-

menced for indebtedness aggregating Five Thousand Dollars ($5,000) and that executions were threatened against its property; that if the assets of defendant were properly handled and conserved by a receiver that the creditors would probably be paid in full. The bill prayed that an accounting might be had and taken between said defendant and its creditors and its assets marshalled and that the Court determine what creditors were entitled to be paid therefrom respectively and that plaintiffs and other creditors might be paid what was justly due them and that a receiver might be appointed with the usual powers of receivers in equity in such causes; that the assets of defendant and the rights of plaintiffs and other creditors might be asserted and that the Court fully administer the funds and property of said defendant and enforce the liens and rights of all the creditors thereof as the same might be finally ascertained. (R. 1–5.)

On the day said bill was filed, to wit December 6, 1919, the defendant, the Rathbone Manufacturing Company, filed its answer to said bill admitting the truth of the allegations contained therein and consenting to the appointment of a receiver. (R. 5.)

Whereupon the said Court duly appointed the Michigan Trust Company, respondent herein, as such receiver and vested in it possession and title to all of the property of any and every kind and description belonging to said defendant with authority to continue the business of defendant until further order of the Court. (R. 5–6.)

On May 15, 1920, the then Director General of Railroads, predecessor to petitioner, filed proof of claim in said Court for certain transportation charges accruing to him as such Director General out of the federal operation of the railroads, said claim amounting to the sum of Three Thousand Nine Hundred and Fifty-Three Dollars and Forty-Six Cents ($3,953.46), together with a claim growing out of the conversion, by said Rathbone Manufacturing Company, of a certain shipment of pig iron of the value of Five Hundred and Twenty-Seven Dollars and Seventy-Four Cents ($527.74), total Four Thousand Five Hundred and Eighty-One Dollars and Twenty Cents ($4,581.20), with interest from September 29, 1919, and claimed priority therefor, because said indebtedness was due the United States. (R. 7–12.)

Said claims were duly allowed and given priority by the Master, John S. Lawrence, who later was succeeded by Kirk E. Wicks. Objections to the allowance of priority was duly filed by the receiver with the said Wicks who set aside the allowance of priority of said claims and allowed same as ordinary claims. (R. 12–13.) Exceptions to said order denying priority were duly taken by the Director General, same being filed June 4, 1923, in the District Court on the ground that the allegations of the bill of complaint asking for the appointment of a receiver established the insolvency of the Rathbone Manufacturing Company, which

allegations were admitted by the answer of defendant.

Before said exceptions were heard, to wit, on August 1, 1923, a stipulation admitting the insolvency of the defendant, Rathbone Manufacturing Company, was duly filed in said District Court, said stipulation being as follows, to wit:

IN UNITED STATES DISTRICT COURT—STIPULATION AS TO INSOLVENCY

Filed August 1, 1923

It is hereby stipulated and agreed by and between the receiver of said above named defendant corporation and the said claimant, by their respective attorneys, that at the time of the filing of the petition for the appointment of a receiver of said defendant corporation the said corporation was, in fact, insolvent in that the aggregate of all its property and assets was not at a fair valuation sufficient in amount to pay the debts of said corporation, the said receiver, however, not admitting that said insolvency was at that time shown by the books of said defendant, or was then known by defendant or by plaintiffs.

(dated) August 1, 1923.

(signed) KNAPPER, UHL & BRYANT,
*Attorneys for Receiver.*
CLAPPERTON & OWEN,
*Attorneys for Director General of Railroads.*

(R. 18.)

On September 15, 1923, the said Court overruled the exceptions to said report of said Master and confirmed his report denying priority to said claims. (R. 18.)

On October 13, 1923, appeal was duly allowed and duly perfected to the United States Circuit Court of Appeals for the Sixth Circuit. That afterwards, to wit, on October 9, 1924, the case was heard by said Court of Appeals and on the 11th day of November, 1924, a decree was entered in said cause by said Court of Appeals affirming the aforesaid order of the District Court. (R. 22-23.)

On the 2nd day of March, 1925, petitioner presented to this Honorable Court a petition for certiorari to the United States Court of Appeals for the Sixth Circuit, which petition was granted April 13, 1925.

ASSIGNED ERRORS

That the Court of Appeals erred in affirming the order of the District Court because

I

The claim of the Director General was a claim of the United States and was for a debt due the United States.

II

That at the time of the filing of the bill of complaint in the suit of the White Sewing Machine Company versus Rathbone Manufacturing Company the said Rathbone Manufacturing Company

was insolvent and by consenting to a decree appointing a receiver it thereby made a voluntary assignment for the benefit of its creditors within the meaning of Section 3466 of the United States Revised Statutes and hence said claim should have been allowed priority.

## ARGUMENT

### SUMMARY

### I

The claims filed by the Director General were claims arising out of the operation of the railroads during Federal control and therefore the moneys due therefor were debts due to the United States.

An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity.

### II

The claim of the Director General is based upon Section 3466 of the Revised Statutes of the United States which provides:

> Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts makes a voluntary assignment thereof, * * *

In the instant case it appears that the debtor, when it was insolvent, joined in an application for the appointment of a receiver of all its property and assets under a creditors bill, which prayed for a marshaling of those assets and the enforcement of the claims and rights of creditors under the orders of the Court. Such an act amounted to a general assignment for the benefit of its creditors and the vesting of the title to its property in the receiver as trustee for its creditors and bound to pay the debts due to the United States first out of the proceeds of such property.

## I

### The claim filed by the Director General was a claim on behalf of the United States

The Court below was of opinion that by reason of Section 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451,456, the Director General was prevented from asserting government priority over other creditors on claims arising out of the governmental war operation of the railroads. The Court conceded that its conclusion differed from that expressed in *In re Hibner Oil Co.* (C. C. A.), 264 F. 667; *In re Tidewater Coal Exchange* (C. C. A.), 280 F. 648; *Davis* v. *Pullen* (C. C. A.), 277 F. 650; and *Davis* v. *Miller-Link Lumber Co.* (C. C. A.), 296 F 649.

The Court in *In re Hibner Oil Co., supra,* in relation to a claim presented, in a bankruptcy pro-

ceeding, by the Director General of Railroads operating the New York Central Railroad said—

> The claim is by the United States for unpaid freight charges due from bankrupt on oil shipments made in August, 1918. over the New York Central Railroad, which was then being operated under Federal control. * * *

The Court then quoted Section 12 of said Act, March 21, 1918, which provided that—

> Moneys and other property derived from the operation of the carriers during federal control are hereby declared to be the property of the United States. * * * This claim for freight charges is " property " derived from operation of the carrier during federal control, and is thus the property of, and therefore a debt due to the United States.

The Court below in the instant case was impressed with the thought that to permit the Director General to have priority over other creditors on claims arising out of the federal operation of railroads would work a great injustice to such other creditors, saying—

> To give the Director General with his manifold claims arising in the ordinary course of business, priority over all other creditors may work great injustice. In some cases it might result in the Director General's taking all or nearly all the assets of the debtor.

This argument of apparent injustice in giving priority to such claims was urged in the *Pullen case, supra,* the Court saying—

> There is a certain obvious injustice in giving the United States when engaging in an industrial and commercial venture, even although under war powers, superior rights over other creditors bearing like relations to insolvents. But this is for Congress; we have no remedial power.

In *Davis* v. *Miller-Link Lumber Co., supra,* the claim of the Director General of Railroads was for the balance of a trackage charge arising out of an agreement granting the debtor the license and privilege of operating its logging trains over certain portions of a railroad then in the possession and control of the Director General. Said claim was given priority as an indebtedness in fact owed to the United States. These two latter cases were affirmed by this Court in *United States* v. *Butterworth-Judson Corporation,* 46 Sup. Ct. Rep. 179.

That a claim accruing out of the operation of the railroads while under federal control and possession by the Director General, as in the instant case, is presented by him on behalf of the United States in its governmental capacity would seem to be clearly settled by the decisions of this Court in the *DuPont De Nemours & Co.* v. *Davis,* 264 U. S. 456, and in *Davis* v. *Corona Coal Co.,* 265 U. S. 219.

Mr. Justice Sutherland in speaking for the Court in the former case and in referring to the Federal Control Act among other things said—

> Accurately speaking the Director General was not a carrier but an operator of carriers. Moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States. In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure. An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity.

In the case of *Davis* v. *Corona Coal Co., supra,* Mr. Justice Holmes in speaking for the Court in referring to the DuPont decisions said—

> The familiar rule was repeated that the United States should not be held to have waived any sovereign right or privilege unless it was plainly so provided. The provisions of Section 10 of the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451, 456, subjecting carriers "to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except," etc., rightly was said by the counsel for petitioner to do no more than subject operations of the carrier to existing laws, not to adopt from the States their several limitations to suits that this

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government might bring while the United States applied no limitations of its own. The distinction in the statute between carriers and the government is pointed out in the above cited case.

## II

**The claims filed by the Director General with the receiver were under Section 3466 United States Revised Statutes, entitled to priority, because the debtor when insolvent made a voluntary assignment of all his property for the benefit of his creditors and the receiver was invested with title thereto as trustee for said creditors and hence bound to give priority to said claims**

The facts in the instant case clearly bring it within the principle announced by this Court in the case of the *United States* v. *Butterworth-Judson Corporation, supra,* from which the following is a quotation, to wit:

> Taken in connection with its insolvency, now conceded, respondent's answer admitting the allegations of the complaint and its consent to the decree appointing receivers amounted to the handing over of all its property and business to the receivers to be administered, under the direction of the Court, as a trust fund to pay respondent's debts. In substance, the things done by respondent amounted to a voluntary assignment of all its property within the meaning of section 3466. The United States is entitled to priority.

EEDTHRU

*Bramwell* v. *United States Fidelity & Guaranty Co. supra,* affirming (C. C. A.) 299 F. 705; *Davis* v. *Pullen* (C. C. A.) 277 F. 650; *Davis* v. *Miller-Link Lumber Co.* (C. C. A.) 296 F. 649; *Cf. Equitable Trust Co.* v. *Connecticut Brass & Mfg. Corp.* (C. C. A.) 290 F. 712; *Davis.* v. *Michigan Trust Co.* (C. C. A.) 2 F. (2d) 194.

(This latter citation refers to the instant case.)

## CONCLUSION

We conclude therefore that the claim presented to the Receiver as aforesaid by the Director General should have been given priority and we respectfully ask that the judgment of the Court of Appeals be reversed and the cause remanded.

Respectfully submitted,

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SIDNEY F. ANDREWS,
*Attorneys for Appellant-Petitioner.*